No. 10131

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ROSE B. LARSON,
Respondent.

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

RESPONDENT'S ANSWERING BRIEF

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The petitioner's assignments of error (R. 75) and statement of points (R. 83) embrace a number of questions not mentioned in the brief *e.g.* item 8 (R. 84) relating to time of receipt of dividends. We assume that such assignments or points not argued are waived, and therefore shall confine our answer to the two propositions discussed in the opening brief which, although presented by the petitioner as one, may be more properly divided into the following specific questions:

1. In the case of the death of the husband in a community property state, leaving only community property, which is administered by the executor nominated by his will, is the income from such property received by the executor and during the course of administration, taxable entirely to the estate or executor, or is one-half thereof taxable to the surviving spouse?

2. Was a certain sale by the executor of 85,000 shares of Sunshine Mining Company stock made from the interest of the deceased only, or equally from the interests of the deceased and his surviving spouse, the respondent?

We shall discuss these two propositions in order.

I.

ALL THE INCOME RECEIVED BY THE EXECUTOR FROM COMMUNITY PROPERTY DURING THE COURSE OF ADMINISTRATION WAS PROPERLY RETURNED BY AND TAXED TO THE EXECUTOR AS FIDUCIARY.

The decedent died June 7, 1934. His will, which was not a non-intervention will, named the Yakima First National Bank as executor and it immediately petitioned, was appointed, qualified and took control of the administration of all of the property of the community. Publication of notice to creditors was begun on June 20, 1934, and time for presentation of claims did not expire until December 20, 1934 (R. 48, 174-175). The estate could not have been settled and distributed, and there was in fact no proceeding or order for distribution thereof during the taxable year 1934. The will (R. 260) made provision for specific bequests totalling approximately $480,000 (§§ 3-15, R. 260-263) and gave all of the residue to the respondent (§16, R. 263). It made no provision for distribution during administration. By paragraph 17 it provided that the executors, if necessary, should have three (3) years to pay the bequests (R. 263).

During the year 1934 the executor received income from the real and personal property of the estate and included all of such income in its federal tax return rendered on behalf of the estate, and the Commissioner received the full tax on all of such income from the executor. In this proceeding the Commissioner seeks to tax respondent upon one-half of the income received by the executor from the community property.

The statement at page 16 of petitioner's brief that the decision in this case will "require an attempt to saddle the estate with the taxes otherwise due from the surviving spouse" implies that the estate has not paid the tax and that the commissioner might encounter difficulty in collecting from it. Such, however, is not the case. The whole income was returned and the tax paid by the estate and the commissioner has assessed the liability and retained the tax from the estate on that basis (R. 89-90).

The question presented is purely one of law as to the application of the federal income tax law, and particularly the provisions respecting returns by estates, to property rights determinable by the statutes and decisions of the state of Washington. In addition to the statutory provisions set forth in the appendix to petitioner's brief, we call attention to article 162-1 of Commissioner's Regulations 86 having to do with the collection of income taxes under the Revenue Act of 1934, and to Section 1419 Remington's Revised Statutes of the State of Washington which is a part of the general statutory provisions relating to administration of community property (Note 1).

NOTE 1. Regulations 86, applicable under the Revenue Act of 1934, provide in part as follows:

> "ART. 162—1. Income of estates and trusts.—
> "* * *
>
> "The income of an estate of a deceased person, as dealt with in the Act, is therein described as received by the estate during the period of administration or settlement thereof. * * *
>
> "The tax upon the net income of the estate or

Before presenting respondent's side of the case, we shall consider briefly two contentions underlying petitioner's argument, both of which we submit are erroneous:

1. Petitioner contends that because the surviving wife has a vested interest in community property she must return the income therefrom during administration, relying on *Poe v. Seaborn*, 282 U. S. 101, and cases of similar import (Petitioner's brief pp. 14 and 15). However, the question here is not determinable by reference to the actual or beneficial interest, any more than any other case of trust income which is returned by and taxable to a trustee who holds the property and receives income for the beneficial owner.

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trust shall be paid by the fiduciary (see section 161 (b). If the tax has been properly paid on the net income of an estate or trust, the net income on which the tax is so paid is not, in the hands of the distributee thereof (the legatee or the beneficiary), taxable as income to him."

Remington's Revised Statutes of the State of Washington provide:

"§1419. Community property, how administered. A surviving spouse shall be entitled to administer upon the community property, notwithstanding any provisions of the will to the contrary, if the court find such spouse to be otherwise qualified; but if such surviving spouse do not make application for such appointment within forty days immediately following the death of the deceased spouse, he or she shall be considered as having waived his or her right to administer upon such community property."

The real question is: To whom does the income from community property go during the period of administration? If it goes to the executor, then it is taxable to the trust or the estate, regardless of the beneficial rights of others, by virtue of the express provisions of the statute, subject only to the statutory limitations regarding amounts paid or distributable. It is a question of receipt and control during administration, not of ultimate beneficial interest. The rights of decedents' heirs or legatees are just as much vested as those of the survivor, and there is no basis for distinction in return of the income, as long as the estate is under administration.

2. It is suggested by implication that the executor had no right to receive or control the income from the community personalty (Pet's. br. p. 18). It seems to be assumed, although the contention is not definitely stated, that because Section 1464 of Remington's Revised Statutes provides that the executor "may receive the rents and profits of the real estate," it was intended to exclude the right of the executor to receive the income from community personal property. However, the Washington decisions, to which we shall refer, show that this contention is entirely unfounded. During administration, title to all of the community personal property vests in the executor and he is entitled to receive the income. This fundamental proposition is so well established both by general probate law and specific decisions of the Washington courts that apparently no statute was deemed necessary as to personal property; but as to real estate, title to

which passes to the heir or devisee immediately upon death, a special statute was enacted to insure that during administration the rents and profits therefrom should go to the executor. The purpose of the statute was not to restrict, but to amplify the powers of the executor.

By the decisions of the Supreme Court of Washington it has been firmly established that in administration under the probate code of the state upon the death of a member of a community, the entire community estate and not merely the decedent's interest therein is subject to administration proceedings. This rule has been followed ever since *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910, holding:

> "But after a careful consideration of the question, and from the interminable confusion that would otherwise result, we are forced to the conclusion that upon the death of one member of the community it is the community estate which is to be administered upon for the purpose of settling the claims against the community, and that in this case the probate court not only acted upon the separate property of John H. Ryan, if he had any, but also upon the community property of the deceased and of Lucy A. Ryan."

Continuing, on page 361:

> "Neither one owns any specific part of this property before the dissolution of the community, and upon its dissolution by the death of one member no part of it can vest in the survivor except subject to the community debts."

Then on page 363 the court added:

> "The statute says one-half shall go to the sur-

> vivor subject to the community debts, and from the very nature of the case it is held in abeyance or suspended to that extent, and *cannot go until these matters are determined and disposed of, and that which is to go is thus ascertained.*" (Italics ours)

The reason for the rule is stated in *Guye's Estate*, 54 Wash. 264, 103 Pac. 25, as follows:

> "Owing to the peculiar characteristics of the community estate, administration upon an undivided one-half interest therein is impracticable, if not impossible, so that administration upon the whole estate is indispensable upon the death of either spouse. The right to name the executor or administrator must vest in either the husband or wife; for, in the nature of things, there cannot be two personal representatives for the same estate acting independently of each other."

To the same effect see:

> *Stanton v. Everett Trust & Savings Bank*, 145 Wash. 165, 259 Pac. 10;
>
> *In re Hill's Estate*, 6 Wash. 285, 33 Pac. 585;
>
> *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482;
>
> *Magee v. Big Bend Land Co.*, 51 Wash. 406, 99 Pac. 16;
>
> *Crowe & Co. v. Adkinson Const. Co.*, 67 Wash. 420 at 424, 121 Pac. 481.

As we have already stated above, during administration the executor is not only entitled to possession of and rentals from community real estate but is vested with the legal title to all of the personal property and income.

"It (the personal property) descends to the executor or administrator for the payment of expenses, debts, legacies and for distribution of the residue."

Devereaux v. Anderson, 146 Wash. 657, 264 Pac. 423.

The rule is so well settled that it seems unnecessary to set forth more than the following quotation from *Collins v. Northwest Casualty Company*, 180 Wash. 347, 39 P. (2d) 896:

"As to the right of Wallace, the specific bequest of the car would not be effective to confer upon him any control pending probate of the will. After probate, title vested in the executor, subject to the claims of creditors of the deceased. Title to the car could come to Wallace only through the executor at the close of administration.

" 'The personalty of the deceased goes promarily to the executor or administrator as assets and not to the heir, and this had been held to be true even though there are no debts, and one claiming the personalty is the sole distributee. The title of an executor or administrator with the will annexed to particular personal property is not affected by the fact that it was specifically bequeathed or has been set aside for the payment of a particular legacy.' 23 C.J. 1127.

" 'It is the settled law of this state that executors and administrators are entitled to the possession and control of the property, both real and personal, of estates while being administered by them, as against heirs and devisees, as well as all other persons. Rem. & Bal. Code §1366, 1449, 1534; *Gibson v. Slater*, 42 Wash. 347, 94

Pac. 648; *Griffith v. James*, 91 Wash. 607, 158 Pac. 251; *Bishop v. Locke*, 92 Wash. 90, 158 Pac. 997." (180 Wash. 347, 351)

In support of his contention that Sections 161 and 162 of the Revenue Act of 1934 do not apply to the income from all of the community property during administration the petitioner relies only on appeal of *Geo. Drumheller*, 27 B.T.A. 209. Petition to review was taken by Commissioner to this court and dismissed on his motion with consent of respondent, 65 F. (2d) 1013. That case is not applicable for a number of reasons. In the first place that proceeding did not involve the question as to whether the income on the half of the community property representing the share of the survivor should be taxed to the estate rather than to the survivor. There the taxpayer was complaining only because the commissioner was taxing *all* of the income on community property to him individually although the estate was in course of administration, but was not complaining about being taxed on one-half thereof, and was only insisting that one-half should be taxed to the estate. While the case involved a non-intervention will, the non-intervention features of the statute were not applicable because the estate was insolvent. The Board sustained the petitioner as survivor of the community in his contention that one-half of the community income should be taxed to the estate, even though it appeared from the Commissioner's determination that the entire income had been distributed to the petitioner. The case did not involve and, therefore, would be no authority for the proposition that all of the income from community

property during administration should not be returned by and be taxable to the estate. The Board recognized this distinction in its opinion (R. 63).

Moreover, if the *Drumheller* case might be considered authority for the petitioner's position, it no longer has any force to that effect in view of the Board's direct decision to the contrary in this case, recently re-affirmed in memo decision in the appeal of *S. P. McBirney*, Docket No. 108982, entered June 23, 1942, in which it said:

> "We are of the opinion that the respondent's contention must be sustained. It is immaterial that ownership of the property in question may have been vested in the heirs at the time of the decedent's death. It is plain that all of the decedent's property was subject to administration as a part of the estate and that the administratrix was entitled to possession of the property under the control of the court having probate jurisdiction until the administration was completed. Chapter 5, sections 290-291, Oklahoma Statutes, Annotated. Cf. *Wagner's Estate* (Okla. 1936) 62 P. (2d) 1186. There is no question but that the actual administration of the estate continued throughout all of the taxable years. In view of these circumstances the income from the property was received by the estate during the period of administration and is taxable to it in accordance with the provisions of section 161 (a) (3), *supra*, despite any vested interests in the heirs. *Rose B. Larson*, 44 B.T.A. 1094. Cf. *Estate of Lucile Gruy*, 42 B.T.A. 1279."

The decision of the Board in the appeal of *Anna L. Compton executrix*, 11 B.T.A. 26, cited by peti-

tioner at page 16 of his brief, did not involve taxation of income arising after the decedent's death and during administration, but concerned the allocation of separate and community property income prior to death, and therefore has no bearing on the present situation.

The most direct court decision on this point is *Barbour v. Commissioner* (C.C.A. 5) 89 F. (2d) 474, 37-1 U.S.T.C. §9222, involving the law of Texas, which is quite similar to that of Washington with respect to administration upon the entire community property. In that case the Commissioner had held and the Board affirmed (memo decision) that profit on sale of stock belonging to a marital community of Texas, sold after death of husband, was taxable one-half to the surviving spouse. Presumably the other half was taxed to the estate. In reversing such holding the court pointed to statutes and decisions of Texas substantially similar to those of Washington with reference to administration of the entire community upon the death of one spouse, and upon consideration of such provisions, held that the income received by the administrator of the estate, while the administration is in progress, is returnable and taxable as income of the estate, and not of the beneficiary. "It is settled that income received by the administrator of an estate, while administration is in progress, must be returned and taxes paid on it as income of the estate, and not by the person ultimately entitled to it" (89 F. (2d) at 476). This, of course, is simply the provision of the Revenue Act of 1934, Sections 161 and 162, which taxes the income to the one who

receives it regardless of the ultimate beneficiary, unless it is actually or constructively distributed. This case has been accepted by the commissioner and applied by the general counsel for the Bureau of Internal Revenue (See GCM 20472 '38 C.C.H. §6491), and so far as we know has never been questioned outside of this proceeding. It was recently recognized by the Board in the appeal of the *Estate of Lucile Gruy*, 42 B.T.A. 1279:

> "If the community property remained under administration in 1935 and the income in question was received by Joseph Gruy in his fiduciary capacity as independent executor of the estate of Lucile Gruy, it is taxable to the estate, as respondent contends. *Barbour v. Commissioner*, 89 F. (2d) 474." (11 B.T.A. at 1285)

A number of other cases have touched on the point, but not so directly as the *Barbour* case. However, the decision of this court in *Alice J. Rosenberg, Administratrix v. Commissioner*, 115 F. (2d) 910, affirming an unreported decision of the Board, is in its general language very apropos. That case involved income from community property which, however, had been acquired prior to July 29, 1927, the date when the California law changed the wife's community interest from an expectancy to a vested interest. Petitioner's husband died in 1929 and the Commissioner determined that all income from community property during administration was taxable to the estate. The petitioner, as survivor of the community and residuary legatee, contended that the income on her community one-half should be taxed to her, rather than

to the estate. In affirming the Board opinion, this court said:

> "Whatever difference may have existed between the rights of heirs in the property of an intestate and the rights of the widow in community property acquired by her husband and herself prior to the year 1927 it is clear that upon the death of the husband their property is subject to administration in the Superior Court sitting in probate. That court not only determines what debts and what expenses of administration are to be paid therefrom but also determines what part of the property of the decedent is community property, when it was acquired, the attributes thereof, and the respective rights of the widow and heirs, devisees or legatees therein. Until the administration of the estate it cannot be determined authoritatively by any other courts what property is and what property is not community property or how the distribution shall be made. (Cal. Probate Code, Deering, 1937, §202,300)
>
> "In view of these considerations the community property is to all intents and purposes a part of the estate of the deceased husband which, under the revenue laws of the United States, is treated as an entity having duties and obligations during the administration of the estate which are distinct from those of the owner of the property which is subject to administration. (Revenue Act of 1932, c.209, 47 Stat. 169, sec. 161 (A) (3), *Id.* Sec. 162 (c), Treasury Regulations 86.)"

Irrespective of the nature of the community interest under the California law, the reasoning of the court in justification of taxing the entire income to

the estate during administration is equally applicable to the administration of community estates under the law of Washington, and supports the position of the petitioner in this proceeding.

In the appeal of J. H. Tippitt, administrator of the *Estate of Laura Tippett*, 25 B.T.A. 69, involving the precise question of whether all of the income from community property during administration under the laws of Texas should be taxed to the estate, the Board held that it was so taxable, saying:

> "It is of course true that upon the death of Laura Tippitt, her interest in the community real estate immediately vested in her heirs, who were the minor children, whose names have already been stated in our findings of fact. But that fact does not affect the control of the community administrator or survivor over the property. Until the community administration is closed, the income from the estate would be taxable in the hands of the administrator, the same as any other estate, under section 219, which we have quoted." (25 B.T.A. 76)

(Section 219 is cited from the Revenue Act of 1926, which is similar to Sections 161 and 162 of the Revenue Act of 1934).

The recent decision of this court in *Frank B. Anderson v. Commissioner*, 126 F.(2d) 46, 42-1 U.S.T.C. §9308, while not directly involving the same point, contains a recognition of the same principle. The decedent left an estate which was considered to be all community property, which was finally distributed by decree dated December 30, 1936. For the year 1936 the wife filed a return which included distribution

from the estate to herself. The commissioner determined a deficiency on the ground that the entire net income for that year was taxable to the estate. The Board sustained the determination and this court affirmed it. While the point directly presented was whether distribution under the final decree was a distribution of the corpus or currently of income, the holding that the entire income was taxable to the estate necessarily involved as a corollary the proposition that one-half of the income from community property during administration is not taxable to the surviving spouse.

Under the foregoing rules and decisions and under the plain wording of the statute governing return and taxation of trust income, including "income received by estates of deceased persons during administration or settlement of the estate," it seems clear the decision of the Board is correct and that the entire income of the community property was properly returned by and taxed to the estate for the year 1934 when it was in course of administration.

II.

THE SALE OF 85,000 SHARES OF CAPITAL STOCK OF SUNSHINE MINING COMPANY WAS INTENDED TO BE AND WAS IN FACT AND IN LAW A SALE OF DECEDENT'S INTEREST ONLY AND NOT OF RESPONDENT'S INTEREST IN SUCH STOCK.

The second question is primarily a factual one, although in arriving at its determination of fact, the Board gave consideration to statutes and decisions of the State of Washington governing the disposition of community property by the decedent and its management by the executor and the legal effect of the probate court orders with respect thereto. The legal result, however, is controlled by the intent of the parties as to whose stock was to be sold. Intent is a matter of fact, *Von's Investment Co. v. Commissioner* (C.C.A. 9) 111 F. (2d) 440; and the Board's conclusion with reference thereto upon the evidence and inferences therefrom is not subject to review. *Wilmington Trust Company Executors v. Helvering*, 86 L. ed. 908, 42-1 U.S.T.C. §9441; *Chicago Stock Yards Co. v. Commissioner* (12th Cir.) 1942 C.C.H. §9607 (decided July 24, 1942). The petitioner recognizes this but contends that the findings are without substantial supporting evidence (petitioner's brief 24). We will therefore briefly review the record on this point.

The community property included 210,974 shares of stock of the Sunshine Mining ompany, of which decedent was president. The matter of listing the stock on the New York Exchange had been considered but disapproved by decedent shortly before his death,

and shortly afterward was revived by Mr. Stolle, a broker associated with one of the stockholders. He took the matter up with Mr. Hardy, president of the Yakima First National Bank, executor of the estate, and who had also succeeded decedent as president of the mining company, to see about getting options on a desired amount of stock as a basis for listing. These negotiations resulted in the execution of five (5) option agreements running from the executor of the estate to Grande, Stolle & Co. dated June 30, 1934, for the purchase by the optionee of 70,000 shares of Sunshine Mining Co. stock (R. 49-53).

Respondent knew nothing of such negotiations or options until about the middle of July, 1934, as she had left for California on June 14th, and did not return until that time. Mr. Hardy went to see her shortly after her return and she told him to take up the matter with her son Shirley Parker, and whatever he approved would be satisfactory (R. 99). Hardy did so, and they in turn consulted Mr. Brown, attorney for the estate, about certain legal phases of the matter (R. 100). Mr. Hardy had no discussion with either respondent or Mr. Parker as to whether any of her community interest, as distinguished from that of the decedent, was to be affected, and Mr. Stolle, who got the option, was not interested in who the stock belonged to as long as he got the desired quantity (R. 137). The matter of whose stock was being sold was left up to the attorneys (R. 103). That was gone into specifically by Mr. Brown, attorney for the estate (R. 111).

Mr. Brown had no discussion with Mr. Parker or respondent to the effect that any part of her interest was being sold (R. 114). The reason for the sale was to obtain money to pay the specific bequests amounting to approximately one-half million dollars (R. 114). He considered what right the executor had to sell the property of the estate and that only the decedent's one-half could be sold to pay specific bequests, and the whole community estate if necessary to pay debts and costs of administration, and advised the executor to that effect (R. 116). There was no necessity to sell any of the assets of the estate to pay debts (R. 117). The respondent and Mr. Parker were advised that respondent's share of the stock would not be affected by the sale to pay bequests (R. 121 and 130). The respondent in no wise approved or consented to any sale of her interest in the stock in 1934 (R. 130).

A petition was presented by the executor and based thereon an order was entered confirming the options and authorizing the sale of 80,000 shares (10,000 sold outright, and 70,000 optioned), based upon the showing "that it is necessary that some part of the personal property of said estate be sold to pay the specific bequests provided in the will herein" (R. 256-260). Five days later a further petition was presented and order entered authorizing the sale of 5,000 additional shares making a total of 85,000 shares sold and optioned (R. 152-154). The testimony shows that there was no change in the intervening period of five days necessitating sale of the additional amount to pay debts or expenses (R. 116). The only purpose of the

sales was to provide funds to pay bequests (R. 110 and 111). While respondent appeared and consented to the sale through Mr. Parker, she did so as residuary legatee, a very natural thing in view of her large interest, and there is nothing to indicate any intent or desire to commit her to a disposition of her own community interest (R. 53-56, 65).

As the petitioner points out in his brief, the debts and claims were comparatively small and there was no necessity for selling assets to pay them (Petitioner's brief 18 and 19).

The estate had a regular income of from $30,000 to $35,000 per quarter in dividends from the Sunshine Mining Company stock alone (R. 109), as well as substantial rentals from real property and as the executor's final accounting shows (R. 181) a great deal more cash income from estate properties, and it was wholly unnecessary in fact and not required as a matter of law for the estate to dispose of such stock at that stage of the administration for the purpose of paying costs of administration, or the widow's allowance, or even to pay debts. The sole purpose of the sale as Mr. Hardy testified was "that we were faced with having to pay about one-half a million dollars in bequests" (R. 110).

From the foregoing it is apparent that not only was there no intent to sell any of respondent's stock, but legally it was impossible for the executor to do so. Section 6892 Remington's Revised Statutes (Petitioner's brief p. 28) restricts the right of the husband to bequeath any part of his wife's community interest,

and by Section 1342 such community interest goes to the survivor, subject only to the community debts but not to any testamentary disposition. According to the statutes neither the court nor the executor had any authority to sell the interest of the respondent to pay the bequests, and as a matter of law the sale made for that purpose under the circumstances could relate only to the interest of the deceased.

In addition to the absence of any consent or agreement by respondent to a sale of her interest, there is also affirmative evidence that only the decedent's interest in the stock was being sold. This is clearly shown both by Mr. Brown's testimony and by the following proceeding in the probate court:

After the exercise of the options, and in May of 1935, the executor filed a petition with the court (R. 155) setting forth that 210,974 shares of the Sunshine Mining Company stock came into its hands as executor "of which a total of 85,000 shares have been sold, leaving in the possession of the executor, your petitioner herein, shares to the number of 125,974 of which said shares Rose B. Larson, as surviving spouse, is the owner of 105,487," and asking a partial distribution to her of 15,000 shares. The order of the probate court entered May 1, 1935 (R. 117) after reciting the aggregate of 210,974 shares of Sunshine Mining Company stock, further recites that "said Rose B. Larson is entitled, as her share of the community property, to receive from said executor, upon the closing of said estate, the total of 105,487 shares." These show beyond any possibility of doubt

or misunderstanding that the executor and the court understood, intended and believed that they had provided for this sale to be made from the interest of the estate and not from the interest of the respondent.

The action of the probate court and its treatment of the matter as a sale of the interest of the deceased and not of the respondent is determinative and binding so far as this proceeding is concerned.

Helvering v. Rhodes (C.C.A. 8) 117 F. (2d) 109, and cases cited;

Estate of Carrie M. Botts, 42 B.T.A. 977 at 985 and cases cited;

Estate of Geo. M. Balzereit, 46 B.T.A. ~~No.~~ 127.

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The problem involves no difficulty of Federal tax law at all but simply a matter of determining, under the facts and the law applicable to administration of community property, what interest was sold by the executor. The respondent's contention and the decision of the Board is supported not only by the evidence and the record, but is squarely sustained by a decision in a very similar case upon the appeal of *Mildred Hubbard*, 30 B.T.A. 619 (Acq.).

That case involved the estate of petitioner's husband who died December 18, 1928, leaving an amount of corporate stock standing in his name which was community property subject to the laws of the State of Washington. Deceased left a will naming his widow as sole beneficiary and also as executrix under non-intervention provisions, which was admitted to probate on January 15, 1929. The assets of the estate greatly

exceeded the liabilities and it was unnecessary to sell any of the stock to pay debts or expenses. Decree of solvency was entered on April 30, 1929, and no part of the proceeds from the sale hereinafter referred to was distributed to the petitioner prior to that date.

Immediately following the probate of the will, and during January and February of 1929, and acting pursuant to a plan and intent to sell the interest of the deceased in such stock, the petitioner, as executrix of the estate, sold one-half of the entire block owned by the community, plus a small amount for her individual account, and the proceeds of such sale of the one-half interest were credited to her account as executrix in the bank. There was no segregation by transfer of the certificates into the names of either the estate or the petitioner as executrix or individually, but the stock sold was transferred from the name of the deceased to a street name to avoid public knowledge of whose stock was being sold.

In the following year the petitioner made a final report to the probate court to the effect that she had sold the one-half community interest of the decesaed in said stock, which was approved by the court.

The Commissioner determined that the petitioner, Mildred M. Hubbard, as survivor and owner of one-half of the community property, was taxable on the profit on one-half of the stock sold by her as executrix for the account of the estate. Upon appeal the Board held that the Commissioner's determination was erroneous. Some question apparently was raised about the validity of the sale, which the Board disposed of

by reference to the powers of an executor under a non-intervention will, thus placing the situation on a par with the instant case where the sale was authorized by order of the court (cf. *Estate of A. E. Larson—Parker v. Hardy, et al.*, 200 Wash. 318 at 335, 93 P. (2d) 431, approving the validity of the sale. The style of this case indicates that none of the parties connected therewith considered Mrs. Larson a necessary party, as would have been the case had they considered that her interest in the stock had been sold).

In the *Hubbard* case the Board pointed to the approval by the court of the report of the executrix of having sold the community interest of the deceased, the equivalent of which occurred in this case in the petition and order for partial distribution (R. 155-157), as recognizing that the sale was made from the decedent's interest, leaving the survivor's share intact. Then, after quoting from *Thatcher v. Capeca*, 75 Wash. 249, 134 Pac. 923, as authority for the proposition that where rights of minors or creditors are not involved a valid partition of the property of an estate may be reached by the agreement of the parties interested without necessity of an order of the probate court, the Board said:

> "* * * In the first place it would not be necessary for her to distribute to herself her full portion at one time; neither was it necessary that equal amounts be earmarked as property of the estate and as distributed to herself as a part of her community share. Secondly, and principally, we are not concerned with the portion distributed to petitioner as her community share, but that

part designated and sold as property of the estate of the decedent. * * *"

Then after referring to the executrix's report which, as here, showed that only the deceased's interest had been sold, the Board continued:

"From this, and from other facts established, namely, the detailed steps taken to partition the stock, the sale of it and treatment of the proceeds as property of the decedent, and the approval of the court having jurisdiction, it is difficult to see what more could be needed to make a valid partition. * * *" (30 B.T.A. at 627)

Bearing in mind that in the present case the court gave prior approval to the petition of the executor (not the survivor) for the sale of stock of the estate, which could not legally have been sold for the contemplated purposes, except to the extent of the interest of the decedent therein, and the subsequent report and approval of the transaction as a sale of such interest of the decedent and not of the survivor, we think it constitutes an even stronger case in favor of the respondent's position.

It is certainly no objection or defense to that position that the sale may have been instigated by persons desirous of listing the stock or that the unsold portion of the stock stood to benefit therefrom. Those circumstances merely afforded the opportunity and market for the sale that was made.

Neither does the fact that in the *Hubbard* case the executrix acted under a non-intervention will render that case at all inapplicable. The non-intervention features of such a will do not affect the substantive prop-

erty rights of the estate on the one hand or of the surviving spouse on the other, but only permit the administration of the estate without the necessity of court order or approval. If anything, the fact in this case that the will was not of a non-intervention character and the executor acted under order of the court is more favorable to the respondent's position. In the *Hubbard* case, where the executrix was also the surviving spouse and beneficiary with unrestricted power to deal with the shares in either character, the line of demarcation between the two interests is less clear than in this case where the executor had no legal right to sell the petitioner's share.

The whole consideration is, after all, primarily a question of fact and intent within the limits of the executor's statutory powers and in view of such considerations we submit:

First, that it clearly appears from all of the evidence that there was never any intent by the petitioner here to sell her interest, and that on the contrary, as confirmed by the court, the sale by the executor was intended to relate only to the interest of the deceased; and

Second, that petitioner's interest could not have been affected or sold because it was beyond the power of the executor or the court to do so for the purpose of paying legacies, and it was unnecessary to sell such interest, and in fact it was not sold, for the purpose of paying debts or expenses of administration.

One other factor may be of significance in reaching a proper disposition of this matter. Petitioner's Exhibit 10 (R. 198) is a deficiency letter addressed

to the Estate of A. E. Larson on May 16, 1940, long after the present proceedings were initiated, determining a deficiency against the estate for the period ending December 31, 1934, in which in addition to the net income disclosed by the return, the Commissioner has added the total profit upon the sale of 85,000 shares which he claims was received by and is taxable *entirely to the decedent's interest* upon the identical transaction involved in this proceeding. While perhaps not an estoppel, it would seem at least to be an election, made after full knowledge of the facts, to pursue a claim which is absolutely inconsistent with that asserted in this proceeding and which should constitute a waiver of petitioner's position here (See R. 201; Refer amended petition R. 34 and 35). The petitioner has made a deliberate choice in his later inconsistent assertion of claim against the estate of A. E. Larson, which should be held to constitute a waiver of his claim respecting the same transaction in this case.

Certainly respondent's assertion of deficiency against the estate of A. E. Larson, treating the sale as made entirely from decedent's interest, which is completely at variance with his position in this case, evidences his lack of faith in this proceeding, and substantiates the contention of the respondent and decision of the Board that no part of her community interest was included in the sale of 85,000 shares.

The decision should be affirmed.

Respectfully,

H. B. JONES,
Attorney for Respondent.